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95-1592

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL COUSIN,

Petitioner,

vs.

OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF TREASURY, JOHN F. DOWNEY, DEPUTY DIRECTOR AND ACTING DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, and ANGELO A. VIGNA, NORTHEAST REGIONAL DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether due process of law is denied and government supervision of financial institutions imperiled by the arbitrary exercise of absolute discretion by the Acting Director of the Office of Thrift Supervision, who is vested with combined investigative, prosecutorial and adjudicative power, in ordering the removal and industry-wide prohibition of a banking officer when in so doing:

a) the acting Director without further hearing reversed all of the recommended fact findings in favor of the official made by the Administrative law Judge who heard witnesses at an evidentiary hearing, and the Court of Appeals expressly approved the reversals as an exercise of "absolute discretion" without subjecting them to heightened scrutiny.

b) the Acting Director made arbitrary rulings of law and condoned arbitrary and illegal actions by his agency and Internal Revenue agents in excess of their statutory and constitutional authority and in disregard and violation of the rights of the banking officer who was the subject of their investigative and prosecutorial excesses, including his right to compulsory process and cross examination to present his defenses.

c) the Acting Director interpreted the disciplinary powers of banking agencies to authorize punishment of banking officers for conduct unrelated to banking including alleged crimes unrelated to banking where there was no conviction or pending criminal charge.

d) the Acting Director ignored disqualifying conflicts of interest and acts of bias by agency personnel who testified and otherwise played key roles in the OTS proceedings.

2. Whether a federal district court in dismissing an indictment against a banking official, leaving no charges pending against the official, has subject matter jurisdiction and legal authority to continue indefinitely without any time limit and thereby modifying an administrative agency's suspension of

the banking official that was based solely on the agency's statutory authority to suspend banking officials who are charged with a felony.

3. Whether a banking official's failure to object to the inclusion of language in an order dismissing an indictment against him which included language that the dismissal was not a final disposition of the indictment for purposes of a statute that provides "the suspension shall remain in effect until such... such indictment is finally disposed of" was a waiver of the banking official's right to due process of law, subjecting him to a continuation of the suspension indefinitely without any charges against him having been asserted or proven by the agency, despite the lack of statutory authority for such a suspension and despite the court's lack of subject matter jurisdiction to incorporate such language in an order.

4. Whether when an administrative proceeding against a banking official results in an order of removal and prohibition barring him from participation in banking, the order moots a court case challenging the legality of the agency's wrongful continuation of his suspension for nearly 2 1/2 years prior to the order in violation of the official's right to due process of law.

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Opinions in the Case

The opinion of the Court of Appeals dismissing petitioner's appeal and denying his petition for review is reported at 73 F.3d 1242 (2d Cir. 1996), A1. The decision and order of the Acting Director of the Office of Thrift Supervision, dated October 11, 1994, and the recommended decision of removal and prohibition of the Administrative Law Judge, dated March 31, 1994, are set forth in the Appendix at A24 and A72. The opinion of the District Court in petitioner's declaratory judgment action is reported at 840 F.Supp. 8 (EDNY 1993), A107.

Basis for Jurisdiction

The judgments sought to be reviewed were rendered and filed on January 3, 1996. 28 U.S.C. §1254(1), to which reference is made in 12 U.S.C. §1818(h)(2), is the statutory provision which confers jurisdiction on this Court to review the judgments in question on a writ of certiorari.

Constitutional Provisions and Statutes Involved

This case involves the provision of the Fifth Amendment to United States Constitution that "No person shall... be deprived of life, liberty or property without due process of law...."

12 U.S.C. §1818(g) provides in pertinent part:

> **(g) Suspension or removal of institution – affiliated party charged with felony**
>
> 1) Whenever any institution-affiliated party, is charged in any information, indictment, or complaint, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a terms exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or

> participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution.... Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or terminated by the agency....

12 U.S.C. §1464(d)(4)(A) (1982), provides in applicable part that OTS may bar an officer from future participation in the affairs of a federally insured banking institution if it finds that the officer has:

> [1] committed any violation of law, rule, or regulation..., or
>
> has engaged or participated in any unsafe or unsound practice in connection with the association, or
>
> has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and
>
> [2] the Board determines that the association has suffered or will probably suffer substantial financial loss or other damage [,] or
>
> that the interests of its savings accounts holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, or
>
> that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty, and
>
> [3] that such violation or practice or breach of

fiduciary duty is one involving personal dishonesty on the part of such director or officer, or

a willful or continuing disregard for the safety or soundness of the association.

12 U.S.C. §1464(d)(4)(A) (1982)(emphasis and format added, A8).

12 U.S.C. §1818(f) provides:

(f) Stay of suspension and/or prohibition of institution -- affiliated party

Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

12 U.S.C. Sec. 1818(i) provides:

(i) Jurisdiction and enforcement; civil money penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section or under section 1831o or 1831p-1 of this title, and such courts shall

> have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Statement of the Cases

Petitioner, Michael Cousin, seeks review of an opinion of the Court of Appeals, 73 F.3d 1242 (2d Cir. 1996), A1, dismissing as moot his appeal from the dismissal of a declaratory judgment action challenging his indefinite suspension by the Office of Thrift Supervision ("OTS") as unauthorized by law and violative of his rights to due process of law, Docket No. 94-6070, "Record I," and denying his petition for review of a subsequent decision and order of the Acting Director of OTS directing his removal as a banking officer of Cross County Federal Savings Bank, Queens, New York and prohibiting him from further participation in banking. Docket No. 94-4206, "Record II." A24.[1]

This case has its genesis in a grand jury subpoena IRS served in late 1986 upon European American Bank for records of petitioner. It is undisputed that petitioner was not a target of the grand jury which was investigating major organized crime in New York City. The sole purpose of the initial subpoena and a subpoena later served by IRS upon a real estate agency, All Queens Tudor Realty (AQTR), to which Mr. Cousin had personal ties, was to enable the IRS agent to establish a close relationship with Mr. Cousin in an effort to use him as a source of information and an informer in the organized crime investigation. See, e.g. RIIA1229. The agent

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[1] References beginning with "A" are to pages of the appendix to this petition. References beginning with "RIA" and "RIIA" are to pages of the appendices in Record I and Record II respectively.

caused subpoenas to be issued, RIIA1229, and followed up with the review of documents to create the appearance of IRS harassment of petitioner knowing of his poor health and heart condition, RIIA1218, RIIA1258, RIIA1264, and the hospitalization of the principal officer at All Queens Tudor Realty and her mother. RIIA1231. This created an opportunity to ingratiate himself to petitioner and caused petitioner to be grateful and to continue discussing prominent persons who were subjects of the major investigation the agent was working on.

At the time this subpoena was served petitioner was at the pinnacle of a distinguished, highly successful career as a banker. As chief executive officer he had guided Cross County Federal Savings Bank through decades of successful operation and growth. Unlike many of the banking institutions subject to regulation by OTS and other state and federal agencies, the Bank's operation had at all times been exemplary and presented no regulatory concerns. As one of the OTS's witnesses conceded, not a breath of corruption or scandal had attached to the Bank's operations during Mr. Cousin's tenure. RIIA1270.

The Bank was a major force in the economic growth of its community. Its conservative banking practices and no frills low cost operation protected depositors and customers in a very difficult period for the savings and loan industry. The Bank was Mr. Cousin's life. RIIA1281-82. His compensation was modest. He worked tirelessly for the benefit of the Bank and its depositors. The Bank played a civic as well as financial role in supporting its community. Mr. Cousin was a civic as well as a business leader in the community. RIIA1342-44.

Petitioner knew there was no basis for the subpoenas and investigations. He therefore honestly believed they should be terminated. He felt befriended by and was grateful to the agent for as it seemed to him protecting him from IRS harassment. The subpoenas, which could have been quashed had their true nature been disclosed, were complied with, records were turned over and the IRS agent obtained the

intended contact with Mr. Cousin resulting in hundreds of taped meetings and phone calls over a period of 3 1/2 years in which the IRS agent pressed for information about organized crime targets and to persuade Mr. Cousin to be an informer.

Mr. Cousin discussed organized crime targets repeatedly with the agent, but refused to become an informer. As a result, petitioner was indicted in September 1990 on six counts for alleged bribery of an IRS agent and two counts charging conspiracy, or aiding and abetting in connection with bribery of the same agent, over three years after the first and nearly two years after the last alleged bribe. OTS in September 1993 added to the bribe claim a claim of illegal gratuity, A959.

All parties to these multiple proceedings, IRS, OTS and the U.S. Attorney concede that Mr. Cousin never sought or received money, or other financial gain from any of his alleged wrongdoing.

On learning of the criminal charges in August 1990, OTS reacted severely and abruptly. It suspended Mr. Cousin on the basis of the indictment, without having knowledge of the facts, any opportunity to weigh them, or any apparent concern for their banking relevance.

Mr. Cousin filed a petition with OTS for a hearing to terminate the temporary suspension, and following the hearing, held before an OTS employee, the Director of OTS, on July 12, 1991, adopted a recommended decision of the employee and ordered continuation of petitioner's suspension and prohibition "until the final disposition of the indictment upon which the Notice is based." RIA-82.

On May 6, 1992 appellant moved orally to dismiss the indictment on the grounds that he was not physically competent to stand trial. The motion was granted. A114. Thereafter by letter dated May 15, 1992 the Regional Director of OTS, acknowledging that OTS was not a party to the criminal case, and stating that OTS had received information that appellant intended to seek reinstatement as Chairman and

CEO of the Bank, requested the Court to "condition the entry of dismissal on Mr. Cousin's consent to a final Order of Prohibition or, in the alternative, to insert specified language in the Order with respect to the dismissal. RIA84.

Petitioner received a copy of the OTS letter and wrote to his counsel directing him not to consent to a final Order of Prohibition. RIA145.

Counsel for petitioner wrote the District Judge setting forth similar language to which he had no objection and on May 25, 1992, the Court issued an order of dismissal containing that language in the final sentence: "This dismissal does not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g), is not a dismissal on the merits, and is a dismissal based solely upon the physical condition of the defendant MICHAEL COUSIN." A115.

Two months later, the Regional Director wrote the Bank's Board members that the OTS Order of Suspension was still in effect, concluding "Cousin is prohibited from participation, directly or indirectly, in any manner in the conduct of the affairs of any insured depository institution." RIA88.

Petitioner represented by new counsel wrote the Director of OTS seeking his acknowledgment that his Order of July 12, 1991 was no longer in effect because once the indictment was in fact dismissed it could provide no basis for further suspension, and that to claim the suspension survived the dismissal of the indictment would leave appellant in a "remediless limbo" damaging important liberty and property interests without due process of law, citing Federal Deposit Insurance Corporation v. Mallen, 480 U.S. 230 (1988).

Further correspondence ensued which did not resolve the matter. On February 5, 1993, petitioner filed a declaratory judgment action seeking a determination that he was not under any suspension.

Three months later, on May 13, 1993, and nearly a year

after dismissal of the indictment against appellant, OTS filed a Notice of Intention to Remove and Prohibit appellant from his offices and all participation in activities of the Bank under 12 U.S.C. §1818(e) containing two counts. RIA100. It did not seek suspension pending a decision on the merits, as it was authorized to do under 12 U.S.C. §1818(e)(3), and which would have been subject to immediate judicial review under §1818(f), relying instead on its contention that its earlier order remained in force, thus denying petitioner immediate judicial review of the suspension under §1818(f). Count I was based entirely on the two largest of the six alleged bribes in the indictment in 1987 and 1988, the others alleging two cash payments of several hundred dollars at Christmas in 1988 and 1989 and on two other occasions items of minimal value of a type distributed as gifts in banking. Count II was based on two counts of criminal conspiracy and aiding and abetting the bribery of the IRS agent by John Parlante who petitioner had told the agent he believed was evading income taxes. See, RIA100.

Petitioner answered the OTS notice, denying the charges and raising several affirmative defenses, alleging, among other things, that the charges were too remote in time and barred by laches,that they were unrelated to banking and had no adverse effect on the bank or its depositors or shareholders, that they resulted from outrageous government misconduct and entrapment and were part of a continuing course of harassment and intimidation of petitioner, the Bank and its directors.

In June 1993, OTS moved to dismiss petitioner's declaratory judgment action for failure to state a claim. Petitioner cross-moved for summary judgment.

In September 1993, the OTS removal and prohibition proceeding came on for hearing and was tried by an Administrative Law Judge on September 13-15, 1993. Petitioner on doctor's orders did not attend. The ALJ received evidence on each of the Counts charged in the OTS notice, principally the elements of the several crimes charged, and observed and questioned witnesses. Post hearing

submissions were filed by both sides.

In January 1994, the District Court granted OTS's motion to dismiss petitioner's declaratory judgment action, A107, holding that petitioner had waived his right to have his suspension terminate with the dismissal of the indictment. The Court rejected petitioner's claims that there was no statutory authority for continuation of the suspension, and that the Court lacked subject matter jurisdiction to extend the suspension by its order. Petitioner appealed.

On March 31, 1994, the ALJ issued his recommended decision. A72.

As to Count I charging bribery of an IRS agent in 1987 and 1988, the ALJ recommended in petitioner's favor, determining that OTS failed to prove (1) any violation of law in 1987, (2) that there was any actual or potential substantial loss to the Cross County Savings or that the interests of depositors could be seriously prejudiced by any of the alleged acts, (3) that petitioner's acts were not directed toward Cross County Savings, and (4) he did not act with wilful, or continuing disregard for the safety, or soundness of the Bank.

As to Count II, charging aiding and abetting bribery, the ALJ found as summarized by the Acting Director of OTS ("AD") that petitioner violated 18 U.S.C. §2 by aiding and abetting, that his conduct, the disclosure of confidential bank information, constituted an unsafe and unsound banking practice and was a breach of fiduciary duty to Cross County and recommended removal. The recommended decision depended entirely on alleged misuse of confidential banking information and the ALJ's conclusion that the Bank will probably suffer substantial financial loss or other damage. A31.

Both parties filed exceptions and other post-decision submissions with respect to the ALJ's recommended decision, and the record was sent to the AD for decision.

Oral argument on petitioner's appeal from the dismissal of his declaratory judgment action was heard on September 14,

1994, before a panel consisting of Circuit Judges Altimari, Lumbard and Oakes. The panel reserved decision.

On October 11, 1994, the AD issued his decision which overruled nearly all of the findings of fact and numerous legal rulings of the Administrative Law Judge (ALJ) who heard the evidence, and decided all issues against petitioner.

Noting that "The Acting Director generally accepts facts relied on by the ALJ," A32, the AD rejected nearly all of the ALJ's fact findings on Count I, most of his fact findings on Count II and many of his legal rulings on both counts.

The AD denied appellant's motion for oral argument and decided the matter on the record and extensive written submissions to his Office by the parties. He ordered "Cousin is removed from office and prohibited from further participation in any manner, in the conduct of the affairs of Cross County" or any other institution. A70.

The alleged bribes totalled less than $10,000 in value and were unrelated to the operation of Cross County. No motive for Mr. Cousin's alleged conduct has even been ventured by OTS, except as to OTS Count I charges where the claim is he sought to pay for the termination of two subpoenas.

The only possible rational explanation for the Count II acts that lead to the indictment and guilty plea of John Parlante is that the IRS wanted to create bribery cases through Mr. Cousin and implicate him for aiding and abetting. Mr. Cousin insisted on assurances and received them that Mr. Parlante was illegally avoiding taxes. He never sought any money, or benefited from his acts. He never turned over any documents without a subpoena and never provided meaningful information beyond names. If he became actively involved in a plan to see whether Mr. Parlante would pay a bribe to avoid tax prosecution, it was apparently because of his antipathy toward tax evaders which he spoke of passionately in conversations with an IRS agent recorded without his knowledge.

On October 28, 1994, OTS moved following the AD's decision, to dismiss petitioner's declaratory judgment appeal as moot. Petitioner opposed the motion.

On November 6, 1994, petitioner filed a petition for review in the Court of Appeals of the AD's decision.

By order filed on December 30, 1994, the panel that had heard oral argument denied without prejudice OTS's motion to dismiss the declaratory judgment appeal as moot and referred the appeal to the panel assigned the petition to review the OTS order of October 11, 1994.

Oral argument of the case was heard on June 23, 1995, before Circuit Judges Kearse, Altimari and Parker. On January 3, 1996, the Court rendered its decision denying the petition for review and dismissing the declaratory judgment as moot. A1.

This petition follows.

Reasons for Granting the Writ

I. The Arbitrary Exercise Of Absolute Discretion By The Director Of The Office Of Thrift Supervision In The Regulation Of The Savings And Loan Industry Is A Danger To The Financial Institutions Of The Nation, The Economy, The Functions Of Other Regulatory Agencies And Violates The Due Process Clause.

Courts have honed principles of due process in judicial proceedings for centuries to assure not only fairness and substantial justice for litigants confronted by the power of the State and in their private disputes, but to assure the integrity and the faithful and effective performance of government and the judiciary itself. The need for due process arises because the rule of law is not self executing and can be effectuated only by procedures that ensure its fair, impartial, efficient and equal application.

In recent decades as the numbers of everything has increased and the complexity of society has compounded, new administrative agencies designed to protect various public interests have been accorded arbitrary powers in the names of expertise, effective action and practical necessity. It was always recognized that discretion in government agents involved a degree of lawlessness proportionate to the degree of discretion. Nearly half a century ago Justice William O. Douglas warned of the dangers of excessive discretion in government agents.

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

U. S. v. Wunderlich, 342 U.S. 98, 102, 96 L.Ed. 113, 72 S.Ct. 154 (1951).

In the most extreme delegation of discretion yet, arising from the savings and loan crisis which cost Americans billions of dollars, Congress vested arbitrary power, seeming absolute discretion and authority to impose ruinous fines and penalties in the Director of OTS.

This political reaction to an emergency arises from the too prevalent instinct that arbitrary decision making and draconian force will save a situation, failing to remember the price humanity has paid for such reflexes. How well such arbitrary power served the public and the S&L industry is indicated by the tragedy which befell both on the OTS's watch.

The industry OTS regulates became so wracked by corruption and failure that the prominent bi-partisan National Commission created by Congress in 1990 to examine the industry and its regulation has called for abolition of vitally

needed thrift banks. The Commission "placed responsibility for the disaster on a failed system of federal regulation rather than on the misdeeds of a few famous criminals."

The recent experience of the U.S. Courts of Appeals which have reviewed OTS actions in the narrow area of removal of bank officials and set aside as ill considered and excessively harsh OTS orders prohibiting bank officials from participation in the industry confirms the Commission's assessment. See Kim v. OTS, 40 F.3d 1050 (9th Cir. 1994)("defendant's conduct does not justify the imposition of such a draconian measure as a permanent Prohibition Order"); Seidman v. OTS, 37 F.3d 811, 924 (3d Cir. 1994) granting Seidman's petition for review and vacating an order for his removal and prohibition and stating with respect to scope of review "deference is not appropriate when "bizarre" interpretations of a statute are made out of regulatory zeal," citing Wachtel and other cases; see also Wachtel v. OTS, 982 F.2d 581, 582 (D.C.Cir. 1993)("We reject OTS'S rather bizarre construction of the statute.").

The principal cause for this costly failed system of federal regulation is the arbitrary power and unbridled discretion administrators believe they possess and exercise. A strong dose of constitutional limitations and due process requirements is the best medicine that can be prescribed for OTS, any successor agency that may replace it and other existing agencies with similar powers. A better case than this in which to analyze the dangerous effects of excessive power and discretion will not be found.

The rights involved are protected by the Due Process Clause.

> It is undisputed that appellee's interests in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause. Federal Deposit Ins. Corp. v. Mallen, 480 U.S. 230 at (1988).

The Court of Appeals has approved the conduct of the OTS proceedings in the most sweeping and uncritical terms:

> The administrative process by which Cousin was disciplined was mandated by statute and entirely constitutional. While the AD had authority over the investigative, prosecutorial and adjucative functions performed by his agency, and while he also had absolute discretion to accept or reject the ALJ's recommended findings of fact and rulings of law when arriving at his Final Order, such combined functions and adjudicatory discretion fall well within the mandates of the Fifth Amendment. A16.

By acknowledging that the Acting Director of OTS has "absolute discretion" to accept or reject the ALJ's recommended findings of fact without acknowledging and exercising the judicial duty of careful review, the Court below has destroyed the utility of administrative law judges and any constitutional protection and fact finding benefit their efforts might offer. No reviewing court would ever claim to have absolute discretion to reject the findings of fact by a trial court nor could due process and sound fact determination be assured where courts did.

In this case the Acting Director denied petitioner any oral argument, rejected nearly every finding of fact by the ALJ, reversed some of his rulings of law and adopted different legal analyses to make its controlling decisions.

A. The AD Arbitrarily Exercised Absolute Discretion To Reverse Fact Findings Of The ALJ

OTS enforcement chose without precedent to proceed against Mr. Cousin with a formal charge in the form of a criminal indictment framed in two counts. Count I relied entirely on alleged violations of federal criminal statutes, while Count II relied on both an alleged crime and banking violations.

The ALJ, a professionally trained hearing officer with no other duties, found against the OTS on each of the three

elements in Count I and was arbitrarily reversed on all three elements by the AD, an acting agency head with no legal training and a bureaucracy to protect. The ALJ found against appellant in all three elements in Count II. The AD declined to adopt the AlJ findings on the second and third elements. He made a finding as to the effect of the alleged conduct that it could cause serious prejudice to bank depositors. He found that personal dishonesty can be a basis for removal and need not relate to the Bank, contrary to the ALJ.

Among others, the Acting Director rejected the Administrative Law Judge's fact findings that

l) there was no bribe in 1987, A44;

2) there was no illegal gratuity, A48-49, a holding that was both inconsistent with his reversal of the ALJ's conclusion there was no bribe, since the same act could not be both a bribe and a gratuity, and unnecessary, demonstrating the AD's determination to support his own enforcement personnel in all things;

3) there was no harmful effect resulting from Mr. Cousin's acts, A53, A57;

4) the personal dishonesty alleged was not related to banking, therefore it could not violate the statute, A60 (Count I), A57 (Count II);

5) there was no possibility of serious prejudice to depositors, A60, A66, Count I and Count II, by implication since the ALJ did not make a repetitious finding. The AD's finding that the conduct could prejudice depositors became the one finding his final decision turns on.

The AD's rejections of the ALJ's findings were arbitrary and are unsupported in the evidence and demonstrate his determination to support OTS enforcement in the proceedings.

Among the AD's arbitrary rejections of the ALJ's

findings are the following:

1) The AD's arbitrary approach is powerfully exposed by his strained disposition of a supervising IRS agent's testimony that he doubted that bribery had occurred in 1987. Stating that the ALJ appeared to rely "largely on the weight he gave to the testimony of" Supervising Agent Fanelli, the AD first complains the ALJ should not have relied on Fanelli's "legal conclusions." A46. Agent Fanelli faced with the facts in the case and the more than three year IRS delay in seeking an indictment, expressed his opinion that it was "iffy" whether a bribe had occurred. The AD then states "...since Fanelli was discussing the possibility of criminal prosecution, ALJ wrongfully applied the standard of proof required by a criminal proceeding -- beyond a reasonable doubt -- to a civil administrative action, which only requires a preponderance of the evidence." A46. The ALJ did not say he required proof beyond reasonable doubt. The test for the possibility of criminal prosecution would have been probable cause, a standard lower than preponderance of the evidence, but "iffy" evidence would fail all these standards. The AD then added that agent Fanelli's testimony "is wholly irrelevant because Respondent was in fact ultimately charged and indicted by a grand jury," apparently believing the indictment is dispositive of the question of guilt. A47. Not willing to rest on these grounds, the AD added, "Furthermore, Fanelli's opinion is not direct evidence of what transpired." Id. He apparently believes that only a person who witnessed an act, and not an experienced supervising investigator who in a very expensive surveillance overheard simultaneous radio transmissions and always reviewed the evidence later, can form an opinion of the legality of acts that is worthy of weight. Having acknowledged that the ALJ relied on other evidence which was abundant in the record to support his finding, the AD states "the Recommended Decision does not identify such evidence," id., without addressing the abundant evidence supporting the ALJ decision.

2) The AD ruled the claims of outrageous government misconduct were "baseless," A52, without noting extensive record evidence to the contrary and the denial of discovery and

cross examination to prove it. He ruled "the record does not reflect that Respondent lacked predisposition," id., apparently placing the burden on Mr. Cousin to prove an absence of predisposition and that OTS denied Mr. Cousin the power of a subpoena and right to cross examine to prove government misconduct and entrapment. He found Mr. Cousin was not "induced" by the agent to make gifts to him despite the agent's own admissions and OTS's denial of discovery. RIA1207, 1216.

3) While arbitrarily reversing the ALJ's finding that Assistant Regional Director Simone's testimony was insufficient to show potential substantial harm to Cross County Savings, the AD fails to address Mr. Simone's egregious conflict of interest under OTS regulations. See, 12 CFR 509.3(c) and 509.40(c). He ignores Simone's direct supervisory responsibility over Cross County, that he first alerted Enforcement of the newspaper report of Mr. Cousins' arrest and that he reviewed the initial Notice which commenced the proceedings. The AD then finds U.S. v. Sette, 334 F.2d 267 (2nd Cir. 1964) "inapposite, as Sette involved expert testimony by the same agents who conducted the investigation; was rendered prior to the adoption of the Federal Rules of Evidence, and did not involve adjudicatory proceedings such as this." fn. 21 at A55. The AD notes "OTS officials, such as Simone, possess the requisite expertise... to make such predictive judgments." But he ignores Simone's testimony, years after the events and the filing of the complaint, alleging that injury "could" result, and that Simone but he could point to no actual injury. See, A55, RIIA1373-74.

4) The lengths to which the AD went to arbitrarily reverse the ALJ and support OTS Enforcement is revealed by his drawing "an adverse inference from Respondent's failure to testify on his own behalf," n. 10 at A45. Mr. Cousin did not testify on doctors orders. But the AD ignores the many places in the hearing and court proceedings where respondent's dangerously poor health is mentioned from the very first secret taping of his conversations by the IRS agent in 1987, to the dismissal of the indictment on grounds of health in 1992. See, e.g, RIIA497, 500, 515, 522, 542, 583, 590, 605, 610, 614, 615, 624, 649. He ignores the evidence in the OTS hearing

concerning Mr. Cousin's absence from the proceedings on doctor's instructions which satisfied the ALJ.

5) The AD ignored the enormous amount of evidence in the record establishing the facts that IRS never believed there was, and IRS admitted it never found evidence of any IRS violation when it subpoenaed the bank records Mr. Cousin produced. Instead he states the IRS agents "duty required him to" issue subpoenas further stating they were "in the course of an IRS investigation," A45, A46 and "the chain of events was commenced by the proper issuance of a subpoena," A52 and was "a legitimate law enforcement inquiry." A55.

The record is clear that the subpoenas were part of a major organized crime investigation as to which all inquiry was prohibited in proceedings below and the IRS knew Mr. Cousin was innocent of any wrongdoing, but wanted to develop him as an informer. The AD, reversing the ALJ, ignores these facts, holding "Respondent provides no creditable, alternative explanation of his behavior and the AD is unable to discern one." A46. Thus he shifted the burden of proof to Mr. Cousin and ignored a record that deals extensively with the history of how the IRS sought out Mr. Cousin by subpoena, worked for four years to develop him as an informer, failed to do so, then waited years before securing an indictment.

6) The AD's finding reversing the ALJ that "the entire bribery scheme was caused by his (Cousin's) design and overtures" is clearly erroneous. The IRS agent first, and repeatedly, asked Mr. Cousin for help for his family and admitted he asked for gifts at the hearing in the face of overwhelming evidence from his own tape recorded words. See, e.g. RIIA1207, 1216.

The Parlante bribery scheme was suggested, designed and could have been accomplished only through the initiative of the IRS agent. The AD's findings that "the entire bribery scheme was caused by his design and overtures," A52 and Cousin "hatched," A64 and carried out the plan to have the Parlante's offer the IRS agent a bribe is belied by the record and the circumstances. The IRS issued the subpoenas, it

directed Cousin, it met Parlante and took his bribe to which he plead guilty. If it had no basis for believing Parlante was evading taxes and would bribe an IRS agent its conduct throughout was illegal, Parlante's conviction should be vacated and the IRS personnel involved disciplined.

7) Perhaps no argument of the AD establishes more clearly his commitment to his own absolute power that his finding

> Respondent's illegal conduct damages the bank official's credibility with its regulator and interferes with the federal regulatory process, with the consequence that no depositor can be confident that his or her deposits enjoy the safeguards the regulatory system provides. A56.

This is to say if OTS doesn't approve of a banker, he can be removed because depositors will have no confidence in him. The ALJ ruled that the statutory "effects" test for Count I had not been met and recommended that Count I be decided in Mr. Cousin's favor. The AD refused to accept this recommendation and took a position that in effect nullified the statutory "effects" requirement.

To accomplish this extraordinary result, the AD held that once he finds a banking official to have engaged in illegal conduct, the conduct damages the bank official's credibility with OTS therefore no depositor would ever be confident that his or her deposits enjoy the safeguards the regulatory system provides. The statutory "effects" test was met for the AD by the depositors' presumed loss of confidence in a bank official because the OTS feels he lost credibility, thus proving that the interests of depositors "could be seriously prejudiced," 12 U.S.C. §1464(4)(A). With the banking official's credibility damaged in the eyes of OTS, depositor confidence that respondent would communicate with regulators with the requisite candor "could be" destroyed, subjecting deposits "to a substantially greater risk than at an institution where the management cooperated with government oversight." A57. Thus, once OTS decides that a banking official has engaged in

misconduct his credibility with OTS is damaged and the effects test is met, without more.

8) Other examples of the AD's inability to weigh the evidence judiciously without impermissible bias in favor of the result the agency is seeking can be found in his view that neither the undeniable absence of "demonstrable significant loss" to the bank nor the role of FDIC insurance in bolstering depositors' confidence, is an obstacle to meeting the "effects" test, A57, in both instances again rejecting the contrary findings of the ALJ, A58. The AD was not only unwilling to see the Bank's successful operation and the absence of any losses much less the devastating failures that have plagued the savings and loan industry as points in Mr. Cousin's favor, he perversely takes the position that the absence of loss merely illustrates the appropriateness and effectiveness of the suspension OTS imposed on Mr. Cousin. The AD comments such action may have "prevented substantial financial loss," A58, and that without the action taken by OTS "It was reasonable to expect... the deterioration of public confidence in the Association would have been more severe and the withdrawals could have been significant." Id. This theory by the AD of loss averted is fantasy for which no support can be found in the ALJ's decision or in the facts. Deputy Regional Director Simone never made such a claim.

B. Arbitrary Actions Of The OTS Violated Due Process Of Law

Among the many arbitrary acts of the OTS in this case were the following:

1) OTS without precedent acted to remove a bank official for alleged violations of criminal law that were unrelated to banking where there was no conviction and no pending indictment, or criminal investigation. It then proceeded to prosecute the case as if it was a district attorney before a criminal court seeking to establish each element of a criminal statute.

While an indictment is pending OTS has authority to

suspend a banker if it finds banking interests, or public confidence are threatened. 12 U.S.C. §1818(g)(1). If convicted, OTS would have authority to remove a banker if it found such interests were threatened. 12 U.S.C. §1818(g)(1). The statutes empower OTS to seek to suspend and remove a bank official even after acquittal of a criminal charge, but not by retrial. See, 12 U.S.C. §1464(d)(5).

OTS recognizes in this very proceeding the absence of any need for it to adopt criminal law standards, procedures and techniques, obtain evidence of crime and charge a banker with criminal acts to be proven in a administrative hearing in order to remove him from office for such conduct. It proceeded in Count II in the alternative by charging Mr. Cousin with unsafe or unsound banking practices, or a breach of fiduciary duty, both acts relating to banking, rather than attempting to prove bribery, aiding and abetting and other crimes.

Such a proceeding has the dual sensibility of addressing matters of concern to the regulation of savings banks and it keeps OTS which has enough to do out of the limitless expanse of a very dubious and peculiar form of criminal law practice. OTS ought to be concerned with the protection of the S & L industry. It should not look for criminal acts law enforcement chooses not to prosecute that are unrelated to banking to adjudicate removal of bank officers.

The consequences of OTS reliance on the alleged violation of criminal law unrelated to banking are seen throughout the hearing and its review. Grand jury subpoenas, wire taps, criminal investigators, files of the U.S. Attorney, IRS and other offices, fields of law remote from banking concerns such as bribery, corruption, aiding and abetting, illegal gratuity, entrapment became the subject matter of a hearing to determine whether a bank official should be removed from office. OTS personnel, the ALJ, the Director of OTS became immersed in facts and law in a pseudo criminal trial wholly foreign to their duties and expertise and unrelated to banking. The improbability of effective or meaningful analysis of complex, irrelevant criminal law issues is compounded by the unattractive spectacle of a banking agency acting like a criminal

court, but applying administrative procedures and standards to determine whether a bank official committed a crime he will not be prosecuted for but for which he may be proclaimed to be guilty by a government banking agency. When the stigma that attaches to a person convicted of crime is considered, there are important reasons in policy as well as constitutional law not to permit civil agencies to play charades with criminal charges.

Presumably the AD would know if there has ever been a case of removal of a bank official based entirely on commission of an alleged criminal act unrelated to banking without a pending indictment, or criminal conviction, in which a civil administrative determination of guilt was made. He has not cited one. OTS acknowledges it never before framed a complaint to charge commission of a crime to be determined in its own proceeding before.

2) The Acting Director ruled, contrary to the recommended opinion of the ALJ, A76, A103, that he had the power to remove Mr. Cousin for an act he deemed dishonest though unrelated to banking. A60. The law requires that to find culpability the misconduct charged must relate directly to the Bank and threaten its safety and soundness. Kim v. OTS, supra, 40 F.3d 1050; Brickner v. FDIC, 747 F.2d 1198, 1203 (8th Cir. 1984); In the Matter of Stoller, FDIC -90-115e, I FDIC Enforcement Decisions and Orders, ¶5174, p. A-1865 (Feb. 18, 1992).

Once again the AD seeks sweeping powers beyond any rational connection with the protection of the savings and loan industry. There is no basis in the law, or the cases, for the view that Congress empowered the Director of OTS to remove bank officers for any act the Director in his absolute discretion deems personally dishonest. Had the Congress so intended, it is doubtful that so vague a standard as personal dishonesty without any requirement that it be related to banking could meet constitutional standards which require reasonable notice of the offense and a rational connection between what is prohibited and what a stated permissible policy seeks to protect.

3) The OTS action was filed six years after the earliest allegedly illegal acts and 2 1/2 years after publicity from government press releases concerning all of the alleged conduct. OTS was unable to show any injury resulting from the alleged acts or the publicity about them at the time it filed its action alleging such injury or at the time of the hearing. Despite this absence of any injury and the impossibility of causally related injury after so many years, the AD found that the acts "could" seriously prejudice the interests of bank depositors. A53. He rejected the ALJ's finding that there was no possibility of substantial financial loss despite the fact that no loss had occurred and a loss could not now happen.

The AD even argued and cited cases for the proposition that he should not have to wait until injury occurs before removing a bank officer in this case where he waited for years knowing no injury occurred before filing his action. It was impossible that any injury could be suffered in 1993 when the proceeding was filed and 1995 when it was decided from such alleged acts in 1987-88 publicized in 1990. Yet OTS pleaded this to be so in 1993 and the AD so held in 1995, rejecting the ALJ's finding. Such arbitrary action violates due process of law.

The Court of Appeals adopted the AD's unsupportable findings and conclusions, observing that while it would be insufficient to base a finding of injury on a banker's credibility "with OTS alone, in "combination" with a finding of injury to depositor confidence which could lead to an exodus of depositors, the evidence was sufficient. A20-21. His unsupported finding of injury to depositor confidence became the sole basis for finding injury and the removal of Mr. Cousin.

4) The AD's finding that Mr. Cousin's alleged disclosure of confidential bank information constituted an unsafe and unsound banking practice and breach of fiduciary duty was arbitrary and not supported by substantial evidence. Mr. Cousin's provision of such information to IRS agent McLaughlin was lawful. OTS regulations, see e.g. 12 C.F.R. §563.180(d), impose a broad obligation on banking officers to

report crimes and suspected crimes to appropriate law enforcement authorities. An agent of the Internal Revenue Service is an appropriate authority to receive a report about suspected income tax evasion. Joan Parlante urged Mr. Cousin to make disclosure: "Whatever they want. Give it to them." RIIA1055. Her consent was genuine and comprehensive and eliminates disclosure as a basis for removal. Raikos v. Bloomfield State Bank, 703 F.Supp. 1365 (S.D.Ind. 1989) upholds a bank's informal furnishing of a customer's documents to an IRS agent.

There was no improper disclosure. No documents were furnished. Mr. Cousin gave the IRS agent, after months of being pressured to help him make cases, the names of the Parlantes whom he believed were evading taxes. He insisted on and received assurances from IRS that there was a basis for tax prosecution. He also provided a social security number and some garbled income information apparently from a mortgage application which was read to him over the phone in the presence of the IRS agent who secretly recorded the conversation. The only meaningful information he provided was the names, since the IRS agent had said he would cause subpoenas to be issued.

5) An OTS statute provides:

> ... no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order. 12 U.S.C. §1818(i)(1).

The Regional Director of OTS who was involved in all OTS removal efforts against Mr. Cousin, conceding OTS was not a party, requested a federal court in May 1992 to include language in a Court order dismissing an indictment against Mr. Cousin not on the merits, but solely on the basis of his physical condition. The language requested would state that the dismissal did not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g). An order with that language was entered without objections by the U.S. Attorney,

or Mr. Cousin's lawyer. The OTS was necessarily aware at that time of this Court's decision in Federal Reserve Board v. M Corp, 502 U.S. 32 (1991) which held courts have no subject matter jurisdiction to enter such an order because of 12 U.S.C. §1818(i)(1). The Regional Director two months later informed the bank board of directors and officers that by virtue of that language in the court order, the OTS order suspending Mr. Cousin on the basis of the indictment was still in effect.

Shortly thereafter in September 1992, counsel for Mr. Cousin appealed to the Director of OTS to acknowledge that his order suspending Mr. Cousin was no longer in effect. The Director rejected the request and threatened Mr. Cousin with civil money penalties if he attempted to associate in any manner with the bank. In early 1993 after several exchanges of correspondence, Mr. Cousin filed suit for a declaratory judgment that he was not under an order of suspension.

Three months later OTS initiated its formal proceeding to prohibit Mr. Cousin from engaging in banking, which is on review here, but it did not seek to enjoin his doing so, relying instead on the court order reciting it was not a final disposition under §1818(g), thereby depriving Mr. Cousin of a statutory right to review suspension immediately. 12 U.S.C. §1818(f).

Mr. Cousin appealed the adverse decision by the District Court denying him a declaratory judgment on the grounds that he had waived his right under the statute to have his suspension terminate on dismissal of the indictment.

The appeal of the District Court's decision was argued in September of 1994. Thereafter in October 1994, the case having been in litigation for 20 months, the OTS moved the Court of Appeals to dismiss the appeal as moot on the grounds that the AD had entered an order against Mr. Cousin prohibiting him from engaging in banking in its administrative proceeding commenced in May 1993.

After Mr. Cousin appealed the AD's order to the Court of Appeals, that Court consolidated the two appeals and rescheduled argument in the declaratory judgment suit to be

heard with the appeal from the AD's decision. Thereafter the Court of Appeals held the issues in Mr. Cousin's case seeking a declaration that the courts had no subject matter jurisdiction to enter the order stating the dismissal of the indictment was not a final disposition for purposes of §1818(g) to be moot.

Mr. Cousin had effectively been prevented by OTS from engaging in banking for nearly two and a half years and forced to litigate his rights under threats of sanctions based on language in the court order procured by OTS in violation of its own statute which it vigorously asserts to prevent judicial interference with its acts. See, Federal Reserve Board v. M Corp, 502 U.S. 32 (1991); Henry v. OTS, 43 F3d 507 (10th Cir. 1994) holding courts do not have subject matter jurisdiction over subject matter described in §1818(i)(1).

II. The Court Of Appeals Failed To Carefully Review OTS's Acts And Decision

Far from providing heightened scrutiny of OTS proceedings to protect constitutional rights, the Court of Appeals approved with general conclusory comments virtually every act of the AD. Most remarkably the Court stated "The AD accepted the ALJ's findings of facts, as recited above, in their entirety." A11-12. This statement is incomprehensible and clearly erroneous. As shown the AD reversed nearly all the ALJ's findings of fact.

The record reveals the serious health condition suffered by Mr. Cousin in every surreptitious recording from 1987 on, including comments about numerous hospitalizations, medical procedures, visits to doctors, pain, medications such as Cardizem CD, 180 mg. once a day, for angina. The indictment against him was dismissed on health grounds after the court appointment of an examining doctor and a hearing. The ALJ accepted medical evaluations supporting Mr. Cousin's request that he not appear at his OTS hearings. In spite of this record the Court of Appeals sarcastically refers to Mr. Cousin's "remarkable recovery", A4, and later comments he should be "grateful for his miraculous recovery." A19. There is no basis whatsoever in the record for such comments and they reflect

some unidentified inability to fairly review the OTS proceeding, or decide the appeal in the declaratory judgment suit.

The Court wrongfully attributes arguments to Mr. Cousin's counsel that were not made, then states "It is disingenuous and contemptible for Cousin to assert that the AD erred in finding a violation of the law when a criminal indictment concerning the matter has been voluntarily dismissed by the government." A19. Cousin's argument in the Court of Appeals, as here, is that OTS has no statutory authority, or interest in undertaking proceedings based on alleged dishonesty or criminal acts which are unrelated to banking where there is no criminal investigation, indictment or conviction based on those acts.

The Court erroneously relies on testimony by a Max Fodera. A18. Max Fodera did not testify. It states the government acquiesced in the dismissal of the indictment only on the condition that language preserving the proceedings before the OTS be included. This is misleading. OTS alone asked for the language. The U.S. Attorney had agreed to the dismissal before the OTS request which violated its own statute. The Court says Mr. Cousin's attorney approved that language, but counsel only stated he had no objection. RIA85. The Court ignored Mr. Cousin's passionate protest later expressed in a letter to the District Judge who dismissed the indictment. A116.

The Court disposed of Mr. Cousin's claims that denial of discovery and evidentiary rulings unlawfully restricted his right to present his defenses to charges of misconduct, absence of harmful effects, culpability, entrapment and outrageous government misconduct by asserting the evidence clearly established his guilt. A22. While the wholly conclusory assertion by the Court is unsupported in the record and contradicted by Agent McLaughlin himself, the evidence Mr. Cousin sought and was denied might have proved his innocence and established defenses he asserted.

Mr. Cousin was denied access to, among other things, OTS documents of bank examinations showing the Bank's

condition at relevant times, and documents to negate any harmful effects to the Bank or its depositors resulting from conduct of Mr. Cousin. Mr. Cousin requested a subpoena duces tecum to compel production of all tape recordings and their transcriptions and IRS memos and reports involving him which would have shown the full extent of Agent McLaughlin's wrongful conduct and his inducement, enticement and manipulation of Mr. Cousin. Cross-examination of IRS agents McLaughlin and Fanelli was severely restricted by repeated assertions that questions violated Fed.R.Cr. 6(e) protecting grand jury functions or IRS instructions limiting authorization for the IRS agent's testimony. Objections were sustained to questions to Agent McLaughlin about the underlying investigation on grounds of grand jury secrecy under Fed.R.Cr.P. 6(e). These restrictions improperly limited respondent's proof because they were erroneously applied to matters outside the reach of Rule 6(e). At the hearing, as well as at the pre-hearing deposition of Agent McLaughlin, counsel for IRS interposed repeated objections which were sustained to questioning of the IRS agents, on the ground it went beyond a limited IRS authorization for their testimony which purported to restrict their testimony to facts about the bribes charged.

Restrictions on cross-examinations of Deputy Regional Director Simone seeking to establish the absence of any basis for his opinion concerning harmful effects of Mr. Cousin's acts and his culpability and conflicts of interest, deprived respondent of his right to compel testimony and the production of documents to show government misconduct and entrapment and denied Mr. Cousin his right to present affirmative defenses that would have entitled him to the dismissal of the charges against him.

The Court of Appeals summarily approved the AD's findings and rulings. Judicial review provided no protection for the important rights violated by OTS.

While courts have approved statutes that vest investigation, prosecution and adjudication under a single agency head, they have recognized the risks inherent in such power. The OTS is delegated the combined functions of

investigation, prosecution and adjudication. The Director is a virtual czar with absolute power over all functions of the agency who can set aside findings of fact by an ALJ and make his own findings from a written record, whether he personally reviewed it or not, subject only to appellate review by the judiciary.

Where an agency head does not accept the findings and conclusions of an ALJ, the courts have recognized their duty to carefully scrutinize the proceedings. See Young v. U.S. Department of Agriculture, 53 F.3d 728, 732 (5th Cir. 1995); Aylett v. Secretary of Housing and Urban Development, 54 F.3d, 1560, 1566-67 (10th Cir. 1995). Where such heightened scrutiny fails, due process rights are at risk.

The findings and conclusions of the AD are "undeserving of judicial deference" and should be subjected to heightened scrutiny, not only because the AD has departed so drastically and cavalierly from the ALJ's determinations, but because the AD's rulings consist of "mere 'litigating positions,'" interpretations formulated during litigation and unsupported by OTS regulations, rulings or administrative practice. See Bowen v. Georgetown Univ. Hospital, 489 U.S. 204, 212 (1988); Martin v. OSHRC, 499 U.S. 144, 155-56 (1991). There is no OTS regulation which calls for removal for acts unrelated to banking or which authorizes continuation of a suspension under §1818(g) if no indictment is pending. Nor is removal here supported by agency practice. OTS removal as well as other disciplinary matters such as cease-and-desist cases invariably involve banking misconduct.

Here the regional director of OTS unilaterally requested a federal court which did not have subject matter jurisdiction to modify an order of dismissal to continue an OTS suspension order in violation of law. The agency relied on that order for nearly a year before the same Regional Director initiated an OTS proceeding. Even then, OTS asserted and relied on the Court order to threaten Mr. Cousin with sanctions for another year and a half before entering its own order against him.

From the moment OTS secured judicial assistance from the District Court to support a suspension for which there was no statutory authority, it had an extraordinary need to vindicate its own conduct and to prevail against Mr. Cousin in the removal proceeding it belatedly filed. This contributed to the excessive zeal evident throughout the record.

OTS then compounded the risks created by the absence of separation of powers by not only investigating and prosecuting the proceeding but by providing all the testimony as to the effects of Mr. Cousin's acts through its own Deputy Regional Director. This is the same official who had direct supervisory responsibility over the bank involved and who first alerted enforcement officials of newspaper reports of Mr. Cousin's arrest in 1990. The AD reversed the ALJ's finding that Director Simone's testimony was insufficient to show potential substantial harm, ignoring as well that Simone could point to no actual injury six years after the acts and four years after the publicity about them. A55, RIIA1373-74. The AD failed to address the conflict of interest created by Simone's testimony under OTS regulations. See, 12 C.F.R. 509.3(c), 509.40(c). The possibility of fairness under such circumstances where an agency is zealously committed to a result from personal interest in a matter that does not even involve, or affect banking was non-existent.

The Court of Appeals rejected the arguments that the AD was biased and acted to protect the agency as having "no merit." concluding "The process by which Cousin was barred from future participation in any federally insured banking institution was statutorily mandated and entirely constitutional." A17

Conclusion

Mr. Cousin's petition for a writ of certiorari should be granted.

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April 2, 1995

Respectfully submitted,

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